No. 97-634

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF CORRECTIONS, et al.,
Petitioners,

v.

RONALD R. YESKEY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether Congress intended the Americans with Disabilities Act, which prohibits any and all state agencies from discriminating against disabled individuals, to apply to state prisons?

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v.

RONALD R. YESKEY,

Respondent.

Respondent Ronald R. Yeskey respectfully requests this Court to deny the petition for a writ of certiorari seeking review of the Third Circuit's opinion in *Yeskey v. Pennsylvania Department of Corrections*, reported at 118 F.3d 168 (3d Cir. 1997), and reprinted at Appendix 1a-13a.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioners fail to set forth the full text of Title II of the Americans with Disabilities Act, 42 U.S.C. §§12131-12165, in either their Petition for Writ of Certiorari or their Appendix, although the full text is relevant to this statutory interpretation question. The following portions are relevant to this Petition:

§12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 502(8) of Title 45).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

§12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity,

or be subjected to discrimination by any such entity.

§12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

§12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under sections 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities," and "communications," regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of Title 29. With respect to "program accessibility, existing facilities," and "communications," such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the

Code of Federal Regulations, applicable to federally conducted activities under such section 794 of Title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

STATEMENT OF THE CASE

Respondent Ronald R. Yeskey was originally sentenced to serve eighteen (18) to thirty-six (36) months in state prison, but the sentencing court recommended that Yeskey instead be placed in the Motivational Boot Camp Program ("Boot Camp"). Complaint ¶¶9-10.[1] Participants in the Boot Camp, which is designed for youthful, non-violent offenders, are released on parole after just six months. *Id.* ¶10; 61 Pa. Cons. Stat. Ann. §1123. In addition to early release, participants receive the benefits of substance abuse treatment, continuing education, vocational training and prerelease counseling. 61 Pa. Cons. Stat. Ann. §1123.

Despite the sentencing court's recommendation, Petitioner Department of Corrections determined that Respondent was not eligible to participate in the Boot

[1]Because Yeskey's case was dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6), all well-pleaded allegations of the complaint must be taken as true for purposes of this appeal. *See Albright v. Oliver*, 510 U.S. 266, 268, 127 L. Ed. 2d 114, 120 (1994).

Camp. Specifically, Respondent "was medically disapproved for participation in the program due to a medical history of hypertension (on medication)." Complaint ¶11. Despite Respondent's repeated requests, the Department failed to reconsider the decision deeming Respondent ineligible for participation in the Boot Camp, and also failed to establish any alternative program offering to disabled persons the same benefits provided by the Boot Camp. *Id.* ¶12.

Respondent brought this suit under Title II of the Americans with Disabilities Act ("ADA") against Petitioners—the Commonwealth of Pennsylvania Department of Corrections and three Department officials (in both their individual and official capacities).[2] Complaint ¶¶4-7. He sought both money damages and an injunction "to immediately enjoin Defendants from administering the Motivational Boot Camp Program without complying with Title II of the ADA and the federal regulations promulgated thereunder." *Id.*, Prayer ¶c.

Petitioners filed a Motion to Dismiss, arguing (1) that Respondent had no protected right to a particular custody status, and (2) that Respondent was not an "otherwise qualified individual" because he could not meet the Boot Camp's requirement of "rigorous physical activity."[3] A Magistrate Judge recommended dismissal of the Complaint because state prisoners do "not have a protected liberty interest in matters of classification or particular

[2]Respondent also alleged violations of the United States and Pennsylvania Constitutions, but those allegations are not at issue here.

[3]Petitioners attached a copy of the Boot Camp's Physical Fitness Manual, and made the unsupported statement that "[c]learly, Yeskey, suffering from a physical condition that prevents his ability to engage in vigorous physical activity, is not an 'otherwise qualified' individual who can meet the boot camp's requirement of 'rigorous physical activity.'" Brief in Support of the Commonwealth Defendants' Motion to Dismiss at 14-15. The district court correctly ignored these unsupported factual allegations, as this was a motion to dismiss, and not one for summary judgment.

custody status" and because "an inquiry by this Court into matters of prison administration . . . would necessarily interfere with the administration's right to police its penal system." Appendix 16a. In responding to Respondent's Objections to the Magistrate Judge's Report and Recommendation, Petitioners for the first time argued that the ADA does not apply to state prison inmates. The District Court adopted this reasoning and, relying on *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 133 L. Ed. 2d 724 (1996), held that the ADA does not apply to state prison inmates. Appendix 17a-19a.

The Third Circuit reversed. Based on the "plain words of [the] statute," as well as the "weight of judicial authority" and the Department of Justice regulations implementing the statute, the Third Circuit held that the ADA applies to state prison inmates. *Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168, 170-74 (3d Cir.), *petition for cert. filed*, 66 U.S.L.W. 3298 (U.S. Oct. 8, 1997) (No. 97-634).

REASONS FOR DENYING THE WRIT

First, there is no important split in the circuits warranting review by this Court. Petitioners' contention that "the courts of appeals cannot agree on whether Congress ever intended the ADA to apply to management of disabled state prisoners" (Pet. 4), is incorrect. The Third, Seventh, Eighth, Ninth and Eleventh Circuits, as well as district courts in the Second and Sixth Circuits, have all found, based on the plain language of the statutes, that the ADA and/or Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act" or "Section 504") do apply to state prisoners. Only two judges in the Fourth Circuit have squarely held that the ADA is inapplicable to state prisoners; a vigorous dissent agrees with the other circuits that these two judges misapplied and misinterpreted a standard canon of statutory construction, the "clear statement rule."

Furthermore, other matters raised in connection with this argument are not ripe for review. The ADA is one of a long line of anti-discrimination laws generally

applicable to business establishments and state and local governments. Petitioners attempt to characterize Congress's application of these general anti-discrimination statutes to all state agencies, including state prisons, as "excessive federal entanglement in the states' operation of their prisons." Pet. 12. Petitioners cannot demonstrate any such intrusion on the record in this case, however, because Respondent's Complaint was dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure, without any factual inquiry or decision on the merits regarding Respondent's particular claims. The Third Circuit specifically noted that Respondent's claim turns on "whether he should (or would) have been admitted to the boot camp. Even with the ADA applicable, Yeskey might not have been admitted for a number of reasons, which will have to be explored on remand." *Yeskey*, 118 F.3d at 174. There is thus no factual record by which this Court could determine whether application of the ADA interfered in state prison management.

Second, there is absolutely no support for Petitioners' contention that there is a split in the circuits regarding congressional power to apply the ADA to state prisons. *See* Pet. 4, 10-12. Indeed, Petitioners failed to raise the issue of the constitutionality of the ADA to the Third Circuit, and all circuit courts to consider the issue have determined that the ADA falls squarely within congressional power to enforce the Fourteenth Amendment. Even if this Court grants certiorari to determine whether Congress intended to apply the ADA to prisons, it should decline to consider this novel constitutional question.

I.

THIS COURT'S GUIDANCE IS NOT NECESSARY TO INTERPRET THE PLAIN LANGUAGE OF THE ADA, WHICH CLEARLY APPLIES TO ALL STATE AGENCIES INCLUDING STATE PRISONS.

The plain language of the ADA, and the clear weight of circuit and district court authority, support the

Third Circuit's decision in this case that the ADA applies to state prisons. Only two judges of the Fourth Circuit have directly held to the contrary—and then only over a vigorous dissent. *See Amos v. Maryland Dep't of Pub. Safety & Correctional Servs.*, 126 F.3d 589 (4th Cir.), *petition for cert. filed* (U.S. Dec. 19, 1997) (No. 97-1113). Moreover, Petitioners' purported fear that application of the ADA to state prisons will cause "chaos" (Pet. 9) raises imaginary difficulties about the application of the ADA in specific circumstances that are not yet ripe for review. There is thus no need for this Court to grant review to interpret the plain meaning of an unambiguous statute.

A. The Clear Weight Of Circuit And District Court Authority Apply The ADA To State Prisons.

Two years prior to passage of the ADA, the Ninth Circuit held that the Rehabilitation Act applies to state prisoners.[4] *Bonner v. Lewis*, 857 F.2d 559, 562 (9th Cir. 1988). The Eleventh and Eighth Circuits followed suit. *Harris v. Thigpen*, 941 F.2d 1495, 1522 n.41 (11th Cir. 1991); *Lue v. Moore*, 43 F.3d 1203, 1205 (8th Cir. 1994) (dicta); *see also Peeler v. Heckler*, 781 F.2d 649, 652-53 (8th Cir. 1986). Recently, the Third, Seventh, and Ninth Circuits have all determined, based on the plain language of the Act, that the ADA applies to state prisoners. *Yeskey*, 118 F.3d at 172; *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 486-87 (7th Cir. 1997) (Posner, J.); *Duffy v. Riveland*, 98 F.3d 447, 452 (9th Cir. 1996); *Armstrong v. Wilson*, 124 F.3d 1019, 1023 (9th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997) (No. 97-686). Moreover, in those circuits in which the issue has not yet been decided, district courts

[4]Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794(a), prohibits discrimination on the basis of disability by programs that receive federal financial assistance. Title II of the ADA extends these protections to all state and local government programs, regardless of whether they receive federal funds. *Yeskey*, 118 F.3d at 170. Title II of the ADA is to be interpreted in a manner consistent with Section 504. 42 U.S.C. §§12134(b), 12201(a).

have consistently applied the ADA to state prison inmates. *See Randolph v. Rodgers*, 980 F. Supp. 1051, 1059-60 (E.D. Mo. 1997); *Herndon v. Johnson*, 970 F. Supp. 703, 708 (E.D. Ark. 1997); *Kaufman v. Carter*, 952 F. Supp. 520, 529 (W.D. Mich. 1996); *Niece v. Fitzner*, 941 F. Supp. 1497, 1505 (E.D. Mich. 1996); *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1036-38 (S.D.N.Y. 1995).

Contrary to Petitioners' contention, the Tenth Circuit has not squarely held that the ADA does not apply to state prisons, but has instead held only that it does not apply to prisoner employment. *See White v. Colorado*, 82 F.3d 364, 367 (10th Cir. 1996). As the Ninth Circuit noted in distinguishing *White*, the plaintiffs in the *Armstrong* case sought "a qualitatively different form of relief than the prisoners in those cases sought. These plaintiffs seek basic access to facilities, inclusion in safety plans, and nondiscriminatory treatment in residential placements and prison programs. 'Rights against discrimination are among the few rights that prisoners do not park at the prison gates.'" *Armstrong*, 124 F.3d at 1025 (quoting *Crawford*, 115 F.3d at 486 (citing *Turner v. Safley*, 482 U.S. 78, 84 (1987))).

Thus, it is only two judges of the Fourth Circuit who have directly held that the ADA does not apply to state prisoners. *Amos*, 126 F.3d at 590-91, 607.[5] Their decision is based on a misapplication and a misinterpretation of a canon of statutory construction, the "clear statement rule," that has not been similarly misapplied by other circuit courts. Contrary to Petitioners' contention, there is thus no "fundamental disagreement between the circuit courts of appeals about whether Congress intended the ADA to apply to state prisoners." *See* Pet. 6.

[5]*See also Torcasio v. Murray*, 57 F.3d at 1342 (defendant prison officials granted qualified immunity because it was not clearly established that the ADA applied to state prisoners, or that obesity was a covered disability). District courts within the Fourth Circuit have also declined to apply the ADA to state prison inmates.

B. This Court Need Not Grant Certiorari To Interpret The Plain Language Of The Acts.

Other courts have had no trouble discerning that the plain language of the ADA applies to state prisons. There is thus no need for this Court to grant certiorari to interpret the ADA's unambiguous language. The language of the ADA could not be clearer. It applies to "*any State* or local government" and "*any* department, agency, . . . or other *instrumentality of a State* or States or local government." 42 U.S.C. §12131(1)(A) (emphasis added). The court below correctly found that this definition "clearly encompasses a state or local correctional facility or authority." *Yeskey*, 118 F.3d at 170. Other courts concur. *See Armstrong*, 124 F.3d at 1024 ("Congress could hardly have spoken 'much more clearly than it did when it made the ADA expressly applicable to all public entities and defined the term "public entity" to include every possible agency of state or local government'") (quoting *Crawford*, 115 F.3d at 485).[6] *See also Amos*, 126 F.3d at 612-13. (Murnaghan, J. dissenting). Indeed, even the majority in *Amos* found that Congress intended the ADA to apply to the states generally. *Id.* at 604. That is, congressional intent to alter the usual balance between the States and Federal Government is plain from the language of the Act.

The ADA prohibits state and local governments from discriminating against qualified individuals with disabilities in the provision of "services, programs, or activities of a public entity." 42 U.S.C. §12132. Again, this language is clear, and it clearly does not exclude state prisons. "Program or activity" is specifically defined in the Rehabilitation Act to include "*all* of the operations of—(1)(A)

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[6] *See also Randolph*, 980 F. Supp. at 1060 ("broad language of both acts was intended to apply to all parts of state government, including prisons"); *Herndon*, 970 F. Supp. at 706 (plain language of Acts applies to prisons); *Fennell v. Simmons*, 951 F. Supp. 706, 708 (N.D. Ohio 1997) (same); *Kaufman*, 952 F. Supp. at 527-28, 529 (same); *Niece*, 941 F. Supp. at 1506 (same).

a department, agency, . . . or other *instrumentality of a State* . . . any part of which is extended Federal financial assistance." 29 U.S.C. §794(b) (emphasis added). Title II of the ADA is to be interpreted in a manner consistent with Section 504. 42 U.S.C. §§12134(b), 12201(a). As the Court below correctly noted, this statutory definition of "program or activity" was "intended to be all-encompassing. . . . It is hard to imagine how state correctional programs would not fall within this broad definition." *Yeskey*, 118 F.3d at 170.[7]

Nor is there any support for Petitioners' contention that the ADA's introductory language suggests the exclusion of prisoners because the goals of the ADA are "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency" so that people with disabilities can "pursue those opportunities for which our free society is justifiably famous." Pet. 6 n.2 (quoting 42 U.S.C. §12101(a)(8), (9)). Indeed, these goals mirror the goals of the Motivational Boot Camp Program, from which Respondent was excluded on the basis of his perceived disability. The Boot Camp Program was created because of the Commonwealth's desire "to salvage the contributions and dedicated work which its displaced citizens may someday offer." Pa. Cons. Stat. Ann. §1122. The statutory objectives of the Motivational Boot Camp are to prepare prisoners to be productive members of free society:

> (1) To protect the health and safety of the Commonwealth by providing a program

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[7] The Fourth Circuit ignored this statutory definition and instead relied upon the unsupported premise that the operations of state prisons do "not fall naturally within the ambit" of the statutory terms "program" and "activity." *Amos*, 126 F.3d at 601. *But see Yeskey*, 118 F.3d at 170 ("'Activity' means, *inter alia*, 'natural or normal function or operation,' and includes the 'duties or function' of 'an organizational unit for performing a specific function.' *Webster's Third New International Dictionary* 22 (1986). 'Program' is defined as 'a plan of procedure: a schedule or system under which action may be taken toward a desired goal.' *Id.* at 1812. Certainly, operating a prison facility falls within the 'duties or functions' of local government authorities").

> which will reduce recidivism and promote characteristics of good citizenship among eligible inmates.
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> * * * *
>
> (3) To provide discipline and structure to the lives of eligible inmates and to promote these qualities in the postrelease behavior of eligible inmates. (*Id.* §1125(b))

See also Bonner, 857 F.2d at 562 (The Rehabilitation Act's "goals of independent living and vocational rehabilitation should in fact mirror the goals of prison officials as they attempt to rehabilitate prisoners and prepare them to lead productive lives . . .").

Because the ADA is unambiguous, the two Fourth Circuit judges erred in applying the clear statement rule. It is unlikely that this mistake will be repeated by other courts. The clear statement rule is a canon of statutory construction that is only to be applied to ambiguous statutes. *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 205-06 (1991); *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). "It is not a warrant to disregard clearly expressed congressional intent." *Yeskey*, 118 F.3d at 173. As this Court recently stated in declining to apply the clear statement rule to an unambiguous statute:

> Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature. Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art., I §1, of the Constitution. (*Salinas v. United States*, –U.S.–, 66 U.S.L.W. 4011, 4013 (Dec. 2, 1997) (No. 96-738) (citations omitted))

Moreover, it is highly improbable that other courts will repeat the *Amos* majority's misinterpretation of the clear statement rule, which is flatly contradicted by this Court's decision in *Gregory*, 501 U.S. 452. There is no support for the *Amos* majority's finding that "a clear statement is required not simply in determining whether a statute applies to the States, but also in determining whether the statute applies in the particular manner claimed." *Amos*, 126 F.3d at 604 (citation omitted). If the two *Amos* judges are correct, then "Congress cannot make the Rehabilitation Act and the ADA [or any other statute] applicable to state prisons or to other areas traditionally reserved to the states unless it separately lists each state agency that the statutes apply to in the statutory text." *Id.* at 614 (Murnaghan, J., dissenting).[8] The court below recognized that this approach has already been rejected by this Court in *Gregory*, which stated "[t]his does not mean that the Act must mention judges explicitly" in order to include them. *Yeskey*, 118 F.3d at 173 (quoting *Gregory*, 501 U.S. at 467).[9]

In *Gregory*, this Court was called upon to determine if a statutory *exception* to the Age Discrimination in Employment Act (ADEA) for certain high-ranking officials encompassed state judges. The Court recognized that the ADEA covers all state employees except those specifically exempted, and stated that "[i]n the context of a statute that plainly excludes most important state public officials, [the exception for] 'appointee on the policy-making level' is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges." 501 U.S. at 467.

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[8]Congress deliberately chose not to list specific state agencies in Title II, but instead made the Act applicable to "any" and "all" state agencies. *See* 42 U.S.C. §12131. Congress understood the difference between specifying "any" or "all" rather than listing only certain covered agencies. *Compare* 42 U.S.C. §12181(7) (listing twelve types of public accommodation covered by Title III of the ADA).

[9]Contrary to Petitioner's suggestion that the court below ignored this Court's decision in *Gregory* (Pet. 8), the Third Circuit carefully analyzed and correctly applied *Gregory*.

The Court thus held that the breadth of the exception (*not* the breadth of the statute) rendered the statute ambiguous, such that the plain statement rule had to be applied. "In contrast to the ADEA, which expressly excludes most high-ranking officials from its reach, . . . the ADA and [Rehabilitation Act] apply to 'any' and 'all' state entities and operations without exclusions." *Armstrong*, 124 F.3d at 1024.[10] "In light of the clear and all-encompassing language of both statutes, there is no basis for requiring Congress to have detailed which of the many important components of state and local governments were to be included in the terms 'any' and 'all.'" *Yeskey*, 118 F.3d at 173.

Although Petitioners are correct that the management of state prisons is generally regarded as a core state function, it does not follow that the plain statement rule applies to any federal law of general application that affects prisons. *Cf.* Pet. 7-8. Cases cited by Petitioners for the proposition that federal courts should defer to the judgment of state prison administrators also demonstrate that federal courts have a duty to intervene to protect state prisoners' federal rights when necessary. *See, e.g., Procunier v. Martinez*, 416 U.S. 396, 405-06, 415-18 (1974) (striking down censorship of inmate mail); *Turner v. Safley*, 482 U.S. 78, 85 (1987) (striking down prohibition on inmate marriages).

Because the plain language of the ADA applies to state prisons, there is no need to examine Petitioners' other arguments regarding legislative and regulatory history.[11]

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[10]The ADA exempts certain classes of individuals but prison inmates are not excluded. *See, e.g.*, 42 U.S.C. §12210(a) (no protection for current users of illegal drugs); *id.* §12208 (no protection for transvestites). When a statute lists specific exemptions, other exemptions are not to be judicially implied. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).

[11]Contrary to Petitioners' contention, there is no conflict between the Third and Fourth Circuits concerning the meaning of the legislative history of the ADA (Pet. 9), since neither Court rested its holding on this (continued...)

Pet. 9-10. However, the Third Circuit's reliance on Department of Justice regulations is amply supported. Ten years prior to passage of the ADA, the Department of Justice promulgated regulations under Section 504 which specifically apply to prisons. *See, e.g.*, 28 C.F.R. §42.540(h) (1980); 28 C.F.R. §42.540(j) (1980); Exec. Order No. 11,914, 45 Fed. Reg. 37,620, at 37,630 (1980). Congress mandated that the ADA regulations be consistent with the Section 504 regulations. 42 U.S.C. §12134(b); *see also* S. Rep. No. 116, 101st Cong., 1st Sess. 44 (1989) (purpose of Title II is to apply Section 504 regulations to state and local governments); H.R. Rep. No. 485, Part II, *reprinted in* 1990 U.S.C.C.A.N. 267, 366, 473 (same). When Congress voices its approval of a pre-existing administrative interpretation of a statute, that interpretation acquires the force of law. *See United States v. Board of Comm'rs*, 435 U.S. 110, 134 (1978); *Don E. Williams Co. v. Commissioner*, 429 U.S. 569, 574-77 (1977). The Fourth Circuit held only that *Chevron* deference[12] was unavailable, but did not discuss these congressional directives that indicate approval of the existing regulations applying Section 504 to prisons. *Amos*, 126 F.3d at 605-07.

C. This Court Should Not Grant Review To Determine The Method By Which The ADA Should Be Applied To Prisons, As That Issue Is Not Ripe For Review.

It is evident that Petitioners' argument for review, and the majority opinion in *Amos*, are based upon an unproven and untried presumption that application of the ADA to state prisons would cause "chaos." Pet. 8-9 (citing *Amos*, 126 F.3d at 600). This also appears to be the chief

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[11](...continued)
history, but stated only that the legislative history did not weigh against its holding. *Yeskey*, 118 F.3d at 174 n.7; *Amos*, 126 F.3d at 602.

[12]*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

concern of other states that have requested that the petition be granted. *See* Brief of Amici Curiae at 2, *Pennsylvania Dep't of Corrections v. Yeskey* (No. 97-634) and *Wilson v. Armstrong* and *California v. Clark* (No. 97-686) (Nov. 1997) (filed by State of Nevada on behalf of itself and other states). That is, Petitioners ask this Court to ignore the plain language of the ADA because its application might interfere with prison management. As Judge Posner recognized in determining that the ADA and Rehabilitation Act apply to state prisons, "[r]ealistically, the state is asking us to amend the two statutes. Realistically, judges do this, or something like it at times." *Crawford*, 115 F.3d at 484. Judge Posner acknowledged that judges use the clear statement rule "when they have great confidence that the legislature could not have meant what it seemed to say," (*id.* at 485), and sometimes formulate exceptions to statutes "to save the statute from generating absurd consequences." *Id.* Although Judge Posner stated that "it might seem absurd to apply the Americans with Disabilities Act to prisoners," (*id.* at 486), he also pointed out

> there is another side to the issue. The Americans with Disabilities Act was cast in terms not of subsidizing an interest group but of eliminating a form of discrimination that Congress considered unfair and even odious. The Act assimilates the disabled to groups that by reason of sex, age, race, religion, nationality, or ethnic origin are believed to be victims of discrimination. Rights against discrimination are among the few rights that prisoners do not park at the prison gates. Although the special conditions of the prison setting license a degree of discrimination that would not be tolerated in a free environment, there is no general right of prison officials to discriminate against prisoners on grounds of race, sex, religion, and so forth. If a prison may not exclude blacks from the prison dining hall and force them to eat in their cells, and if Congress thinks that discriminating against a blind person is like discriminating against a black person, it is not obvious that the prison may exclude the blind person from the dining hall, unless allowing him to use the dining hall would place an undue burden on prison management. (*Id.* at 486 (citations omitted); *accord*, *Yeskey*, 118 F.3d at 174)

To the extent that the two-judge decision in *Amos*, and Petitioners' arguments for review here, are based on the imagined difficulties in applying the ADA to state prisons, such alleged difficulties are not yet ripe for review.[13] The two Fourth Circuit judges unjustifiably criticize the Third and Seventh Circuits for "transform[ing] themselves into contortionists attempting to avoid the necessary consequences of their holdings by declining to outline the meaning of 'reasonable accommodation' and 'undue burden' in the prison context." *Amos*, 126 F.3d at 600. However, that question was not before either court, because both cases arose from dismissals under Federal Rule of Civil Procedure 12(b)(6) on grounds that the ADA does not apply to state prisons. *Yeskey*, 118 F.3d at 169; *Crawford*, 115 F.3d at 483. Thus, there had not been any factual determination on which to decide these issues. Nor has there been such a factual determination in any of the cases presently pending before this Court on petition for writ of certiorari.[14] Thus, the fear of undue interference with state

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[13]Nor should the Court grant review because of the *amici* States' claims that their litigation workloads have increased slightly because of prisoner suits brought under the ADA. The fact that a new law brings additional lawsuits is no reason for eviscerating the law.

[14]In *Armstrong* the Ninth Circuit held that the ADA applies to state prisons, but did not consider any particular order or injunction. *Armstrong*, 124 F.3d at 1022-25. In *Amos*, the Fourth Circuit affirmed the

(continued...)

prison administration expressed by the *Amos* judges is both premature and unwarranted,[15] and presents no issue warranting review by this Court at this time.

II.

THERE IS NO SPLIT IN THE CIRCUITS OR OTHER REASON FOR THIS COURT TO CONSIDER WHETHER CONGRESS HAS THE POWER TO APPLY GENERALLY APPLICABLE NON-DISCRIMINATION LAWS TO STATE PRISONS.

As a preliminary matter, Petitioners' second argument for review—that Congress lacks power under the Fourteenth Amendment to apply the ADA to state prisoners—was not raised by Petitioners in their Brief to the Third Circuit, nor considered or decided by that court. Moreover, there is no support for Petitioners' contention that the question of whether Congress can use its enforcement power under the Fourteenth Amendment to apply the ADA to state prisoners "is very much open to question." *See* Pet. 11. No circuit court has even considered this question. *See also Amos*, 126 F.3d at 603 (noting that appellees there did not argue that Congress lacked the power to apply the ADA to state prisons). Petitioners' last ditch attempt to challenge congressional power to apply the

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[14](...continued)
district court's grant of summary judgment. *Amos*, 126 F.3d at 612. In *Clark*, the Ninth Circuit affirmed the district court's decision not to dismiss the State of California based on the Eleventh Amendment. *Clark v. California*, 123 F.3d 1267, 1269, 1271 (9th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3308 (Oct. 20, 1997) (No. 97-686).

[15]The ADA does not require state officials to take any action that would "fundamentally alter" the nature of the service, program, or activity or that would create an undue financial or administrative burden. 28 C.F.R. §35.130(b)(7) (1991); 28 C.F.R. §35.150(a)(3) (1993); 28 C.F.R. §35.164 (1991). *See also Onishea v. Hopper*, 126 F.3d 1323, 1336 (11th Cir. 1997) (Rehabilitation Act "mandates judicial consideration of interests particular to the prison system").

ADA to state prisons is wholly unsupported, and should not be considered by this Court.

CONCLUSION

In light of the fact that the Court has already granted certiorari in this case, we urge the Court to make clear that the question presented is restricted to the question of the statutory interpretation of the ADA: Did Congress intend to apply the ADA to state prisons? As argued above, the question of the constitutionality of applying the ADA to state prisons is not properly before this Court.

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Respectfully,

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